



October 20, 2014

VIA ELECTRONIC MAIL

## **FREEDOM OF INFORMATION ACT REQUEST**

**Re: Freedom of Information Act Request for Records Related to the Environmental Protection Agency's Evaluation of 2,4-D Choline Salt Herbicide on Endangered Species**

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 as amended by the Center for Biological Diversity (Center) — a nonprofit organization dedicated to the protection of native species and their habitats through science, policy, and environmental law — for records held by the Environmental Protection Agency (EPA) **that the Center specifically intends to disseminate to the general public.**

The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life. The Center's Toxics and Endangered Species Campaign employs a broad range of tools to reduce the harmful impacts of toxic contamination from pesticides, endocrine disruptors, heavy metals, and other toxic substances that enter the environment. Through strategic litigation, creative media, policy advocacy, scientific reports, coalition building and outreach to our members, the Center's campaign targets some of the most harmful toxins in our environment. Consistent with this mission and consistent with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I respectfully request the following information on behalf of the Center:

- **All records and correspondence related to the Environmental Protection Agency's "Addendum to 2,4-D Choline Salt Section 3 Risk assessment: Refined Endangered Species Assessment for Proposed New Uses on Herbicide-Tolerant Corn and Soybean for AR, KS, LA, MN, MS, MO, NE, ND, OK, TN." (Docket #: EPA-HQ-OPP-2014-0195-2419).**

**"All records" includes, but is not limited to, any and all memoranda, maps, studies, reports, data, correspondence, comments, conversation records, files, electronic mail records, phone notes, meeting notes and all other documents.**

This request applies to EPA files in any form, including comments received formally and informally, via U.S. mail, fax, email, and both during and after the official public comment period. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not in the original record. This request does not exclude additional records that, though not specifically requested, have a reasonable relationship to the subject matter of this request.

For this request, the term “records” refers to, but is not limited to, documents, consultations, correspondence, memoranda, biological opinions, assessments or evaluations, letters, notes, schedules, emails, telephone logs, minutes of meetings, work papers, reports, studies, photographs and other images, data, maps, GPS or GIS data, UTM, LiDAR, etc. If you withhold any information, please identify all such information with specificity. If portions of a record are determined to be exempt from release, FOIA requires any releasable portion to be segregated and disclosed.

Please provide all records in a readily-accessible, electronic, .pdf format that is text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). Specifically, we ask that you provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “profiles” or “embedded files.” Profiles and embedded files within files are not readily-accessible. Please do not provide the records in a single .pdf file. We appreciate the inclusion of an index.

If you should seek to prevent disclosure of any requested records, we request you: (i) identify each such document with particularity (including date, author, recipient and parties copied), (ii) explain in full the basis for seeking non-disclosure, and (iii) provide the Center with any severable portions of the records for which you do not claim a specific exemption. 5 U.S.C. § 552(b). Please explain any redactions by reference to specific provisions of FOIA that allow information to be exempted from disclosure.

## REQUEST FOR FEE WAIVER

### **I. The Center Specifically Intends to Disseminate All Records Received to the Public.**

The Center specifically intends to make all records that are not subject to a confidential business claim pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or otherwise restricted by 7 U.S.C. § 136h, available to the general public. All records will be placed on a website that will allow the public to retrieve them. The Center will also provide to the public a full list of all confidential information being withheld to illustrate the limitations of FIFRA on meaningful public engagement on issues impacts public health and environmental protection. This in turn will shed light on the EPA’s ability or lack thereof to comply with the Endangered Species Act with respect to pesticide registrations, registration reviews, and new product labeling.

### **II. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

This requested information will significantly contribute to public understanding of the issues involved, as defined by the Environmental Protection Agency.

#### **A. The subject of the request concerns “the operations and activities of the government.”**

The subject matter of this request relates to potential registration of the new product Enlist Duo and the EPA's failures to enter into consultations with the U.S. Fish and Wildlife Service (the Service) regarding the impact of this new pesticide product on endangered species. 2,4-D, one of the primary ingredients in Enlist Duo is a potent herbicide with likely adverse impacts on a wide variety of endangered species. Release of this information will assist the public in understanding the risks of 2,4-D on endangered species and understanding the role of effects on endangered species in the EPA's pesticide registration decision process. It is clear that protection of human health and environmental impacts are specific and identifiable activities of the government, in this case the Environmental Protection Agency. See *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

**B. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).**

The information requested will help provide the Center with crucial insight into the impacts of 2,4-D on endangered species and will assist in understanding and examining the decision-making processes relating to registration of 2,4-D and 2,4-D products. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of the EPA's duty to consider effects threatened and endangered species during the pesticide registration process. The release of these records is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of EPA's obligations under the law to protect human health and the environment under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as well as how the EPA incorporates data generated by corporations with a vested outcome in the registration process under FIFRA. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See *Judicial Watch*, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested records potentially provide new information about the effects of 2,4-D on endangered species and about EPA's pesticide registration process. See *Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also *Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”). Finally, this request will also shed light on whether the EPA is appropriately implementing environmental laws and regulations.

**C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.**

Public understanding of the process by which EPA conducts pesticide registration actions with respect to compliance with the Endangered Species Act will be significantly increased as a result of disclosure because the requested data will help reveal more about the information gaps and weaknesses of decisions underlying the EPA's environmental risk evaluation process for a suite of environmental threats in the future relating to pesticides. In other words, once the public is more aware of actions by EPA, the public will (1) have a better understanding of the roadblocks to protecting threatened and endangered species; (2) have a better understanding of the internal decision-making processes regarding the registration of pesticides and the evaluations of the harms to listed species; and (3) be able to better gauge whether EPA actions are/have been appropriate and consistent under applicable laws including FIFRA and the ESA.

The records are also certain to shed light on the EPA's compliance with environmental laws, especially the Endangered Species Act and FIFRA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action. The Center is not requesting these records merely for their intrinsic informational value. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. Judicial Watch, 326 F.3d at 1315.

The Center plans to take the information it learns from the disclosed records and educate the public about the impacts of 2,4-D on endangered species. *See Western Watersheds Project*, 318 F.Supp.2d at 1040 ("In the letter denying the appeal, the FOIA Officer stated that WWP had failed to demonstrate . . . how the information would contribute to the understanding of the general public of the operations or activities of the government. The Court, however . . . finds that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and . . . how management strategies employed by the BLM may adversely affect the environment."). There can be no dispute that disclosure of the requested records may provide information that will significantly enhance the public's understanding of the EPA's regulation of environmental threats in general and under FIFRA more specifically. Even if the records fail to reveal that certain actions need to be taken does not mean the records do not serve the public interest. See Judicial Watch, 326 F.3d at 1314.

### **III. Obtaining the information is of no commercial interest to the Center.**

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

### **IV. The Center has a recognized ability to disseminate this information broadly.**

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public (e.g. the Center has several staff biologists and staff attorneys), (4) the Center possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species, biodiversity, and impacts on protected species.

Public oversight and enhanced understanding of the EPA's duties is absolutely necessary. The Center members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." Judicial Watch, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. Id.

The records requested in this FOIA request will be used to evaluate the actions of the EPA with respect to Enlist Duo's registration and 2,4-D's registration review. Concurrent with any action which the Center may take after obtaining the requested records, the Center will publicize the underlying actions of the EPA and/or other federal agencies that have prompted these actions. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one.

The Center intends to use the records requested in this request in a similar manner. The Center's work appears in well over 2,000 news stories in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Last year, more than 1.5 million people visited the Center's extensive website, viewing a total of more than 6.5 million pages. The Center also sends out more than 200 email newsletters and action alerts per year to more than 800,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 50,000 members. The Center also regularly tweets to more than 18,000 followers on Twitter. The Center intends to use any or all of these far-reaching outlets to share with the public information obtained as a result of this request.

This letter clearly demonstrates that the Center specifically intends disseminate all records that are not subject to a confidential business claim pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or otherwise restricted by 7 U.S.C. § 136h, available to the general public, that the Center qualifies for a full fee-waiver, and that you will immediately begin to search and copy the requested material. If you difficulty reading, cannot otherwise comprehend the simple concept that the Center specifically intends to disseminate the records that it receives from this FOIA

request to the general public, or have other questions regarding this request, you may contact me at (202) 817-8121 or [bhartl@biologicaldiversity.org](mailto:bhartl@biologicaldiversity.org). All records and any related correspondence should be sent to my attention at the address below so that I can disseminate them to the general public with specific intent.

With the aforementioned specific intent to disseminate records to the general public,

A handwritten signature in dark ink, appearing to read "Brett Hartl", with a long, sweeping horizontal line extending to the right.

Brett Hartl  
Endangered Species Policy Director  
Center for Biological Diversity  
1411 K Street NW, Suite 1300  
Washington, D.C. 20005